Supreme Court, U. S.
FILED
MAR 14 1974
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1973.

No. 73-1289.

SAKS AND COMPANY, ALFRED DUNHILL OF LONDON, Inc., and FABER, COE & GREGG, Inc.,
Cross-Petitioners,

v.

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA as Interventor,
Respondents,

ALONSO MENENDEZ, *et al.*,
Respondents.

Brief in Opposition to Cross-Petition for a Writ of Certiorari.

Jac M. Wolff,
Attorney for Respondents,
Alonso Menendez, et al.,
655 Madison Avenue,
New York, N. Y. 10021

Jac M. Wolff,
Myron Cohen,
On the Brief.

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IN THE

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Cross-Petitioners,

v.

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERO as Interventor,

Respondents,

ALONSO MENENDEZ, *et al.*,

Respondents.

Brief in Opposition to Cross-Petition for a Writ of Certiorari.

Cross-petitioners conditionally apply for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered September 24, 1973, with the proviso that such writ shall *not* issue unless this court should grant the petition for a writ of certiorari filed by The Republic of Cuba (73-1287).

Opinions Below.

The opinion of the Court of Appeals (Joint Appendix, pp. 2a-38a) is reported at 485 F. 2d 1355 (2nd Cir. 1973). That of the District Court (Joint Appendix, pp. 41a-75a) is reported at 345 F. Supp. 527 (S.D.N.Y. 1972).

Jurisdiction.

This court's jurisdiction has been invoked under 28 U.S.C. §1254.

Questions Presented.

1. Did the courts below correctly hold that the American importers, cross-petitioners, did not satisfy their obligations to pay the owner-respondents for cigars shipped to these importers before intervention?

2. Did the courts below correctly hold that the importers were required to pay interest on their obligations to the owner-respondents?

Statement of the Case.

The owner-respondents owned and operated cigar factories in Cuba and shipped their merchandise, among others, to American importers located in New York City, until the owner-respondents' plants were intervened by the Cuban Government on September 15, 1960.

After intervention, seemingly actuated by a motive to promote a profitable future business relationship with the Castro Government, these importers elected to pay the price of such pre-intervention shipments to the interventors, without the consent or knowledge, or authority of the owners. The courts below ruled that such payments to the interventors did not discharge the importers' obligations to the owners for the pre-intervention cigar shipments, and granted judgment in favor of the owners, against the importers, with interest from the date of the commencement of the actions.

Argument.

Cross-petitioners do not claim that the Court of Appeals rendered a decision which conflicts with that of any other court of appeals on the same matter. The various circuits are quite uniformly in accord with, and support, the judgment herein, as between the owners and the importers. Nor is any claim made here that the Court of Appeals decided an important question of Federal law which has not been, but should be settled, by this court. There is serious doubt as to whether any question of Federal law is presented herein as between the owners and the importers. No Federal question has been decided herein which is in conflict with applicable decisions of this court. The judgment herein is clearly in accord with the decisions of this court.

On September 15, 1960, the Cuban Government intervened the owners' cigar factories in Cuba. Prior thereto, the owners sold and delivered to the importers in the United States large quantities of cigars. The importers failed to pay the price of these pre-intervention cigar shipments to the owners. Instead, they consciously chose to pay the interventors therefor after they had become fully aware of the intervention and change of status. It was so stipulated. The courts below found that the payments made by these importers to the interventors were unauthorized and without the owners' knowledge or consent. The trial court found that the importers knew that the owners would not benefit from the payments made to the interventors. The importers acknowledged they "knew, of course, that they were dealing with new people." Furthermore, the importers had the choice of refusing to pay the interventors for pre-intervention cigar shipments or to make the payments therefor to the owners, or to deposit the money in court, or to refuse to pay anybody for these pre-intervention shipments until an

adjudication by the court. The importers elected to pay the interventors to insure future profitable dealings with the Cuban Government and its interventors. They deliberately gambled, and admitted that they had no genuine doubt as to whom they were making the payments.

The nine separate consolidated actions were commenced by the owners against the importers early in 1961. Thereafter, following the decision and judgment in *F. Palicio y Compania, S.A. v. Brush & Bloch*, 256 F. Supp. 481 (S.D.N.Y. 1966), aff'd 375 F. 2d 1011 (2nd Cir. 1967), cert denied 389 U. S. 830 (1967), the interventors were permitted to intervene in these consolidated actions. In *Palicio*, the judgment of the District Court decreed:

That, as between the owners and The Republic of Cuba, (1) the owners alone, and not the interventors, were entitled to enforce and prosecute the claims for the debts due from the American importers for the purchase price of the pre-intervention cigar shipments; (2) the owners retained title to the U. S. registered trademarks, and (3) the interventors were entitled to the proceeds of the post-intervention shipments.

The trial court granted judgment in favor of the owners, and against the importers, for the invoice prices of the pre-intervention cigar shipments; that the payments made by the importers therefor to the interventors did not constitute payment to the owners, and that the importers remain liable to the owners for such pre-intervention shipments.

At this point, it is strongly suggested that the issue as to whether the importers satisfied their obligations to the owners to pay for the pre-intervention shipments, is not a Federal question, but is one dealing with New

York State law, where these transactions occurred. On pages 12 and 13 of the cross-petition, these petitioners placed their sole reliance on New York decisions. This raises a question of jurisdiction on that aspect of the case, as well as on the interest question.

As to interest: The courts below awarded prejudgment interest to the owners on their recovery for the pre-intervention shipments.

Insofar as the owners are concerned, the importers were parties to these actions from the very outset, since 1961. The trial court, in its opinion, 345 F. Supp. 547, 548, held that the owners were entitled to interest by virtue of CPLR 5001(a), New York's interest governing statute (McKinney's New York Consolidated Laws). That conclusion was based on both law and equity, for these importers had the free, profitable use of the owners' money for over 13 years. Such money was worth a great deal more than the legal rate of interest. The importers had ample opportunity to deposit these monies in court. They preferred using them to operate their businesses.

If the importers had deposited the money in court, the interest would have been cut off under Rule 67, Federal Rules of Civil Procedure.

As to trademark infringement: The cross-petitioners do not seek review of that aspect of the judgment below.

Conclusion.

The courts below correctly held that the importers did not satisfy their obligations to the owners for the pre-intervention cigar shipments by making payment to the interventors, without the consent or knowledge of the owners. Justice required that all parties were obligated to pay, and to receive interest on their claims and offsets. There are serious questions as to the jurisdiction of this court to accept the cross-petition as to the non-Federal questions of payment and interest, which were determined according to New York law.

No valid reasons for allowance of a writ of certiorari have been presented. The cross-petition for certiorari should be denied.

Respectfully submitted,

JAC M. WOLFF,
Attorney for Respondents,
655 Madison Avenue,
New York, N. Y. 10021

JAC M. WOLFF,
MYRON COHEN,
On the Brief.